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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CHRISTOPHER L. HINTON, JR., Appellant.	2 CA-CR 2009-0280 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20084498

Honorable Hector E. Campoy, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra
Tucson
Attorneys for Appellee

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K E L L Y, Judge.

¶1 After a trial, a jury found appellant Christopher Hinton guilty of aggravated driving with an alcohol concentration (AC) of .08 or more while his license was suspended or revoked. On appeal he maintains the trial court erred in denying his motion to suppress the evidence against him on that charge. Finding no error, we affirm.

Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdict. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). In November 2008, two Tucson police officers noticed a pickup truck that appeared to be speeding. The officers "paced" the truck and determined it was traveling fifty miles per hour in a thirty-mile-per-hour zone. The truck also was missing its license plate light. The truck did not stop immediately when the officers "initiated the emergency lights" and siren on their otherwise unmarked vehicle; instead, the driver continued for several blocks before ultimately stopping in a high crime area. The officers approached the truck with their weapons drawn; put handcuffs on the driver, Hinton, and placed him in the back of the police car.

¶3 While doing so, the officers noticed Hinton had bloodshot, watery eyes and "a moderate odor of intoxicants on his breath," and thus suspected him of driving under the influence of an intoxicant (DUI). After one of the officers asked if he had been drinking, Hinton admitted he had had "a couple of beers." The officers then called for a DUI officer to administer field sobriety and horizontal gaze nystagmus (HGN) tests. The DUI officer arrived on the scene after approximately thirty to forty minutes. Hinton exhibited six out of six possible cues on the HGN test, which was consistent with

neurological impairment. One officer later testified he had noticed what appeared to be marijuana on the driver's seat, on Hinton's clothing, and on the floorboard of the truck.

¶4 Hinton was charged with one count each of aggravated DUI while his license was suspended, revoked, or restricted; aggravated driving with an AC of .08 or more while his license was suspended, revoked, or restricted; and possession of marijuana. After the trial court granted Hinton's motion to suppress the evidence related to the marijuana charge, the state dismissed that charge. The jury found Hinton guilty of aggravated driving with an AC of .08 or more and he was sentenced to a four-month term of imprisonment followed by three years' probation. This appeal followed.

Discussion

¶5 In the sole issue raised on appeal, Hinton maintains the trial court should have granted his motion to suppress. He argues "he was arrested at the moment the officers approached him with their pistols drawn" and, because "there was no basis for an arrest at that point, the arrest was illegal, and the subsequent evidence obtained was the fruit of the illegal arrest and should have been suppressed." When reviewing a trial court's denial of a motion to suppress, we consider only the evidence presented at the suppression hearing and draw all reasonable inferences in favor of upholding the court's ruling. *See State v. May*, 210 Ariz. 452, ¶ 4, 112 P.3d 39, 41 (App. 2005). We defer to the trial court's factual findings unless they are clearly erroneous, but we review legal conclusions de novo. *See id.* "[W]hether an illegal arrest occurred and the subsequent implications for admissibility are mixed questions of fact and law . . . ." *State v.*

Winegar, 147 Ariz. 440, 444, 711 P.2d 579, 583 (1985).[1] We therefore review them de novo insofar as they involve "the legal conclusions to be drawn from the[] facts." *Id.* at 445, 711 P.2d at 584.

¶6 Hinton does not challenge the validity of the officers' initial stop of his vehicle or whether they had "a reasonable suspicion that [he had] committed an offense." *State v. Livingston*, 206 Ariz. 145, ¶ 9, 75 P.3d 1103, 1105 (App. 2003); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (arguments not raised on appeal waived). Rather, Hinton maintains the officers in effect arrested him without probable cause when they "approached with their pistols drawn and aimed toward [him], ordered him to keep his hands on the steering wheel, ordered him from the car, and immediately handcuffed him."

¶7 "An arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest." A.R.S. § 13-3881(A). Generally, "[a]n arrest occurs when 'the suspect's liberty of movement is interrupted and restricted by the police.'" *State v. Miller*, 186 Ariz. 314, 320, 921 P.2d 1151, 1157 (1996), *quoting State v. Ault*, 150 Ariz. 459, 464, 724 P.2d 545, 550 (1986). But not every restriction on a person's liberty constitutes an arrest. Police officers may conduct limited detentions for investigatory purposes without probable cause, as long as the

[1]The state argues the officers had probable cause to arrest Hinton when they stopped his vehicle based on his having thrown debris they believed to be contraband from the truck while they were following it. Because we conclude the trial court properly admitted the evidence as the product of a permissible investigatory detention, we do not address whether the officers had probable cause to arrest Hinton.

detentions are supported by reasonable suspicion. *See State v. Box*, 205 Ariz. 492, ¶ 16, 73 P.3d 623, 628 (App. 2003).

¶8 "[A] seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). "[T]here is no 'bright line rule' to apply when making this determination, only the approach of reason and common sense applied to the totality of the particular circumstances." *State v. Romero*, 178 Ariz. 45, 49, 870 P.2d 1141, 1145 (App. 1993).

¶9 In this case, Hinton does not argue that his detention violated his constitutional rights. Rather, he essentially contends that the manner in which the officers approached his truck was inconsistent with a valid investigative detention and therefore amounted to an unlawful arrest. He maintains that the officers did not follow "the typical procedure for a traffic stop" and that their explanations for why they had drawn their guns while approaching his vehicle "were unfounded."

¶10 At the suppression hearing, one of the officers testified he had seen Hinton throwing something that "looked like . . . some type of foliage . . . [or] plant" out of his truck; the material had been "loose" and "light" and had appeared to be "contraband." He also testified that he and the other officer had approached Hinton's vehicle with their weapons drawn and in a "low ready" position[2] because Hinton had not stopped immediately, had been seen throwing something from the truck, and had stopped in an

[2]The officer testified that, when a gun is held in the "low ready" position, it is "point[ed] in the general direction of the suspect, but not directly up at the suspect, in a lower position," such as "at the suspect's knees or waist."

area that was "a high gang area, [with a] high crime rate." Thus, both officers testified they had had concerns for their safety. They also noted that Hinton had failed to comply with their commands when they approached the vehicle.

¶11 "The use of force does not transform a stop into an arrest if the situation explains an officer's fears for his personal safety. An officer may take reasonable measures to neutralize the risk of physical harm and determine whether the person detained is armed." *Romero*, 178 Ariz. at 49, 870 P.2d at 1145. Here, as noted, both officers testified the truck had stopped in a high-crime area and, based on that fact as well as on Hinton's behavior, they had concerns for their safety. Hinton maintains the trial court rejected this testimony, quoting the court as stating the area was "beautiful . . . to walk through." But the trial court went on to say that it could not take judicial notice of the neighborhood's condition. And, although Hinton's counsel emphasized in his argument the lack of officer-safety issues in the area, the court ultimately concluded the initial stop and Hinton's detention had been reasonable under the circumstances, thereby implicitly accepting the officers' testimony on this point. Indeed, at the conclusion of the hearing, the court stated that, "under the circumstances the police were justified for their own security in extracting [Hinton] . . . for a detention."[3] In view of the above evidence

[3]The trial court also stated: "[W]e have enough for reasonable suspicion to stop. No question that the police effectuated a stop and an arrest at the . . . point in time that they extracted him at gunpoint." But the court then stated it was considering the "subsequent detention and DUI investigation" and "the reasonableness of the detention under the totality of the circumstances," suggesting it was actually viewing the events as a detention, not an arrest. The court also concluded the "stop [had been] lawful in the first instance," "there were signs and symptoms of intoxication . . . warrant[ing] a further detention upon the initial stop," and it was "reasonable for Mr. Hinton to have

and the trial court's findings, we conclude the officers' actions in restraining Hinton were justified under the circumstances and did not transform his detention into an arrest.[4]

Disposition

¶12 Hinton's conviction and sentence are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

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been detained until [the DUI officer] was dispatched to the location." Finally, in its minute entry from the hearing, the court concluded "the officers were justified in removing the defendant from the vehicle."

[4]Hinton additionally maintains that, because the trial court excluded the marijuana evidence found in his truck, it should have excluded the DUI evidence as well because "the same rationale applied." The court apparently excluded the marijuana evidence because it believed the officers had not seen it in plain view but instead had found it under the seat when they searched the truck after Hinton had already been placed in the police car, thereby violating *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710 (2009). Thus, it did not exclude the marijuana evidence on the basis of the illegal-stop argument.